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NO. 68464-7

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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JOAQUIN A. MORAN,

Appellant,

v.

STATE OF WASHINGTON,  
EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

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**RESPONDENT'S BRIEF**

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COURT OF APPEALS  
DIVISION I

ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES .....1

1. Did the Commissioner properly exercise discretion in concluding that Mr. Moran’s employer had good cause for not participating in the first administrative hearing when the judge denied the employer’s request for a continuance after its key witness did not hear the judge’s telephone call because she was called away from her desk after waiting for over 30 minutes?.....1

2. Under the Employment Security Act, disqualifying misconduct includes a violation of a reasonable employer rule of which the employer had or should have had knowledge. Did the Commissioner correctly conclude that Mr. Moran committed misconduct when he repeatedly reported inflated inventory totals in violation of his employer’s rule after receiving a final warning directing him not to do so?.....1

III. COUNTERSTATEMENT OF THE CASE .....2

IV. STANDARD OF REVIEW.....9

A. Review of Factual Matters .....11

B. Review of Questions of Law.....12

C. Review of Mixed Questions of Law and Fact .....12

V. ARGUMENT .....13

A. The Commissioner Properly Exercised Discretion in Concluding that the Employer Had Good Cause for Not Participating in the First Administrative Hearing .....13

|     |  |    |
|-----|--|----|
| B.  | The Commissioner Correctly Concluded that Mr. Moran Committed Misconduct Based on Substantial Evidence that He Violated His Employer’s Known Reasonable Inventory Rule ..... | 17 |
| C.  | Mr. Moran’s Conduct Is Not Exempt from Misconduct under RCW 50.04.294(3).....  | 23 |
| VI. | CONCLUSION .....   | 26 |

## TABLE OF AUTHORITIES

### Cases

|  |            |
|--|------------|
| <i>Anderson v. Emp't Sec. Dep't</i> ,<br>135 Wn. App. 887, 146 P.3d 475 (2006).....                | 10         |
| <i>Cheek v. Emp't Sec. Dep't</i> ,<br>107 Wn. App. 79, 25 P.3d 481 (2001).....                     | 25         |
| <i>Clark v. Payne</i> ,<br>61 Wn. App. 189, 810 P.2d 931 (1991).....                               | 20         |
| <i>Cowles Publ'g Co. v. Emp't Sec. Dep't</i> ,<br>15 Wn. App. 590, 550 P.2d 712 (1976).....        | 17         |
| <i>Daniels v. Emp't Sec. Dep't</i> ,<br>168 Wn. App. 1009, 281 P.3d 310 (2012).....                | 18, 19, 20 |
| <i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> ,<br>107 Wn.2d 693, 732 P.2d 974 (1987)..... | 11         |
| <i>Graves v. Emp't Sec. Dep't</i> ,<br>144 Wn. App. 302, 182 P.3d 1004 (2008).....                 | 13, 14     |
| <i>Griffith v. Emp't Sec. Dep't</i> ,<br>163 Wn. App. 1, 259 P.3d 1111 (2011).....                 | 12, 24     |
| <i>In re Estate of Jones</i> ,<br>152 Wn.2d 1, 93 P.3d 147 (2004).....                             | 11         |
| <i>Kinnan v. Jordan</i> ,<br>131 Wn. App. 738, 129 P.3d 807 (2006).....                            | 20         |
| <i>Leibbrand v. Emp't Sec. Dep't</i> ,<br>107 Wn. App. 411, 27 P.3d 1186 (2001).....               | 21         |
| <i>Markam Group, Inc. v. Emp't Sec. Dep't</i> ,<br>148 Wn. App. 555, 200 P.3d 748 (2009).....      | 12, 24     |

|   |            |
|---|------------|
| <i>Martini v. Emp't Sec. Dep't</i> ,<br>98 Wn. App. 791, 990 P.2d 981 (2000).....                                 | 14         |
| <i>Morin v. Burris</i> ,<br>160 Wn.2d 745, 161 P.3d 956 (2007).....   | 14         |
| <i>Nelson v. Emp't Sec. Dep't</i> ,<br>98 Wn.2d 370, 655 P.2d 242 (1982).....                                     | 17         |
| <i>Smith v. Emp't Sec. Dep't</i> ,<br>155 Wn. App. 24, 226 P.2d 263 (2010).....                                   | 10         |
| <i>State v. Walton</i> ,<br>64 Wn. App. 410, 824 P.2d 533 (1992).....   | 11         |
| <i>Tapper v. Emp't Sec. Dep't</i> ,<br>122 Wn.2d 397, 858 P.2d 494 (1993).....                                    | passim     |
| <i>W. Ports Transp., Inc. v. Emp't Sec. Dep't</i> ,<br>110 Wn. App. 440, 41 P.3d 510 (2002).....                  | 12         |
| <i>Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency</i> ,<br>81 Wn. App. 403, 914 P.2d 750 (1996)..... | 10, 11, 12 |

**Statutes**

|                            |        |
|----------------------------|--------|
| RCW 34.05.440(2).....      | 13     |
| RCW 34.05.510 .....        | 10     |
| RCW 34.05.558 .....        | 10, 11 |
| RCW 34.05.570(1)(a) .....  | 10     |
| RCW 34.05.570.(1)(d) ..... | 10     |
| RCW 50 .....               | 17     |
| RCW 50.01.010 .....        | 17     |
| RCW 50.04.293(3).....      | 23     |

|                            |            |
|----------------------------|------------|
| RCW 50.04.294(1).....      | 18         |
| RCW 50.04.294(2).....      | 18         |
| RCW 50.04.294(2)(f).....   | 18, 19, 20 |
| RCW 50.04.294(3).....      | 23, 24     |
| RCW 50.04.294(3)(a) .....  | 24         |
| RCW 50.04.294 (3)(b) ..... | 24         |
| RCW 50.04.294(3)(c) .....  | 25         |
| RCW 50.20.066(1).....      | 17         |
| RCW 50.32.040 .....        | 16         |
| RCW 50.32.095 .....        | 14         |
| RCW 50.32.120 .....        | 10         |

**Other Authorities**

|  |    |
|--|----|
| <i>Webster's Third New International Dictionary</i> 772 (1993) ..... | 25 |
|--|----|

**Rules**

|               |        |
|---------------|--------|
| CR 55(c)..... | 13, 14 |
|---------------|--------|

**Regulations**

|                         |    |
|-------------------------|----|
| WAC 192-04-180.....     | 13 |
| WAC 192-150-200(2)..... | 17 |
| WAC 192-150-210(4)..... | 19 |
| WAC 192-150-210(5)..... | 19 |

**Administrative Decisions**

*In re Shay,*  
Emp't Sec. Comm'r Dec.2d 970 (2011) ..... 14

## I. INTRODUCTION

A general manager who repeatedly reports inaccurate inventory totals to his superiors after receiving a final warning not to do so commits misconduct. The Respondent, Employment Security Department, denied the application for unemployment benefits of Appellant, Joaquin A. Moran, because his employer discharged him for violating its reasonable rule governing reporting inventory, of which Mr. Moran was well aware. Under the Employment Security Act, such a violation constitutes misconduct and disqualifies a claimant from receiving benefits.

Substantial evidence supports the findings of fact of the Commissioner of the Department, and the Commissioner correctly concluded that Mr. Moran committed disqualifying misconduct. The Department asks this Court to affirm the Commissioner's decision.

## II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Commissioner properly exercise discretion in concluding that Mr. Moran's employer had good cause for not participating in the first administrative hearing when the judge denied the employer's request for a continuance after its key witness did not hear the judge's telephone call because she was called away from her desk after waiting for over 30 minutes?
2. Under the Employment Security Act, disqualifying misconduct includes a violation of a reasonable employer rule of which the employer had or should have had knowledge. Did the Commissioner correctly conclude that Mr. Moran committed misconduct when he repeatedly reported inflated inventory totals

in violation of his employer's rule after receiving a final warning directing him not to do so?

### III. COUNTERSTATEMENT OF THE CASE<sup>1</sup>

Mr. Moran served as the general manager of a Seattle-area Krispy Kreme store from February 2003 until he was fired on August 30, 2010. Agency Record (AR) at 31, 141, 195; Finding of Fact (FF) 1.<sup>2</sup> He was fully responsible for managing the financial affairs of the store, which included properly implementing his employer's inventory procedures. AR at 36–38, 102, 154–155, 195; FF 3, 8. These procedures required a weekly hand count of every individual item of food, retail, and packaging in the store. AR at 45, 57, 125–140, 195; FF 4, 5, 6.

About two years before his employer discharged him, Mr. Moran received a last and final warning for intentionally overstating inventory levels by thousands of dollars. AR at 37, 61–62, 155, 195–96; FF 8, 9. The warning indicated that he admitted being aware of some of the inflated inventory numbers. AR at 155. The warning also instructed Mr. Moran to immediately implement his employer's standard inventory

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<sup>1</sup> Mr. Moran's statement of the case includes numerous factual assertions and references to the administrative record that are not supported by the Commissioner's findings of fact. *See* Appellant's Br. The Department provides this counterstatement of the case to present the facts as found by the Commissioner, which are the basis for this Court's review.

<sup>2</sup> For ease of reference and the sake of consistency, the certified administrative record is referred to here as "Agency Record," as Mr. Moran has designated it in his brief. The number in parentheses represents either a specific finding of fact (FF) or conclusion of law (CL).

procedures and stated that he agreed to record all of the inventory numbers accurately. *Id.* Finally, the warning stated that any subsequent inventory inaccuracies, dishonesty, or manipulation of inventory numbers would result in his termination. *Id.* Mr. Moran signed and dated the warning, certifying that he understood the problem, what he needed to do to correct it, the time in which he had to do so, and the potential consequences for failing to follow the proper procedures. *Id.* Mr. Moran thus was aware of his employer's inventory reporting rule. AR at 37, 155, 195–96; FF 8.

At some point after receiving the warning, Mr. Moran decided to delegate the responsibility for counting to the office supervisor. AR at 36, 45, 61, 102, 195; FF 6. He was one of the few general managers who did not personally hand count the inventory. AR at 102, 195; FF 6. Despite assigning this duty to a subordinate, Mr. Moran retained the ultimate responsibility for ensuring the accurate reporting of inventory levels. AR at 38, 102–03, 195; FF 2, 6. He testified that he regularly reviewed the weekly inventory counts and investigated any potential discrepancies. AR at 59–60, 66, 195; FF 6.

While Mr. Moran was on vacation in August 2010, the assistant manager of the Krispy Kreme store conducted the weekly inventory count and discovered that the prior week's inventory report overstated the quantities of numerous items. AR at 32, 152, 156, 196; FF 11. When

asked about these discrepancies, the office supervisor, Ms. Ayde Velasco, told her superiors that Mr. Moran had instructed her to inflate the totals for certain items and to continue including in inventory other items that were no longer in the store. AR at 46–49, 83–85, 196; FF 13. The motivation for overstating the inventory totals was to cause Mr. Moran’s supervisors to believe that the store was more productive than it actually was. The weekly sales figures stayed the same, but, by increasing the inventory numbers, Mr. Moran’s supervisors would believe that the store used or sold less inventory to achieve those figures than it actually did. *Id.*

Mr. Moran denied instructing the office supervisor to falsify the inventory records and claimed that he was not aware of the inflated numbers. AR at 55–61, 86–90, 196; FF 12, 14. At a later administrative hearing regarding Mr. Moran’s unemployment benefit eligibility, the Administrative Law Judge (ALJ) resolved the conflicting testimony by expressly finding that, based on the individuals’ respective demeanors, motivations, and logical persuasiveness, the testimony of the employer’s representatives was more credible than that of Mr. Moran. AR at 195, 197; FF 2, 17. The Commissioner later adopted this finding. AR at 209. Thus, the testimony of the office supervisor about the instructions that Mr. Moran gave her was found more credible than Mr. Moran’s contradictory testimony.

One inflated inventory item was the number of cubes of shortening in the store's fryer. AR at 101–05, 107, 197; FF 15. The fryer holds no more than 14 cubes, but some inventory reports indicated that 18 to 22 cubes were contained in the fryer at any one time. *Id.* The office supervisor testified that Mr. Moran told her to report that the fryer contained 18 cubes. AR at 107. Mr. Moran agreed that a fryer can hold only 14 cubes of shortening but denied giving her this number and claimed ignorance of this over-reporting. AR at 104–05, 197; FF 15. The ALJ later found that Mr. Moran's denial was not credible in light of his knowledge of the proper amount of shortening and his regular review of the inventory reports. AR at 59–60, 66, 104, 195, 197; FF 6, 15. The Commissioner adopted this finding. AR at 209.

The inventory count conducted in Mr. Moran's absence also revealed that mugs and shirts that Mr. Moran's co-manager had given away to store employees months earlier continued to appear in inventory counts. AR at 51–52, 57–58, 76–77, 83–84, 197; FF 15. The office supervisor testified that Mr. Moran knew that these items had been distributed and were no longer in inventory but instructed her to continue to include them in her inventory counts. AR at 83–84. Mr. Moran admitted knowing that his co-manager had given away the mugs and shirts and that they should have been eliminated from inventory reports. AR at

55–59, 197; FF 15. But he claimed that he did not instruct the office supervisor to continue counting them and denied knowing that she continued to do so. AR at 58, 197; FF 15.

Again, the ALJ found that Mr. Moran’s assertions were not credible given his regular review of the inventory counts, his deep understanding of the store’s financial performance and goals, and the more credible testimony of the office supervisor. AR at 197; FF 17. The ALJ found highly improbable Mr. Moran’s assertion that he regularly reviewed the inventory and financial reports without noticing these discrepancies. Accordingly, the ALJ concluded that he either instructed the office supervisor to inflate the numbers or wholly failed to supervise her and conduct a basic review of the weekly inventory. AR at 197; FF 17. The Commissioner adopted these findings as well. AR at 209.

Mr. Moran’s employer discharged him for these repeated inventory discrepancies, citing the final warning he had received in 2008 for engaging in the same behavior. AR at 34–37, 152–54, 195; FF 2. Mr. Moran applied for unemployment benefits, and the Department initially granted them. AR at 111–15. The employer appealed this determination, and the Office of Administrative Hearings (OAH) set a telephone hearing for 9:15 AM on November 22, 2010. AR at 109–10, 119–20.

The employer, ICON LLC, hired TALX to represent it during the appeal process. AR at 119–20. Prior to the hearing, its TALX representative provided the notice of hearing and exhibits to Ms. Sabina Heacon, an ICON manager. AR at 24–25, 197; FF 19. Ms. Heacon then provided these documents to Mr. Moran’s former direct supervisor, Ms. Melissa Surby-Curtin, who was to be the employer’s primary witness at the upcoming hearing. AR at 22, 197; FF 19. The day before the hearing, the TALX representative called Ms. Surby-Curtin to confirm her telephone number and her availability for the hearing. AR at 24–25, 197; FF 19.

On the day of the hearing, the TALX representative called into the hearing and provided the ALJ the name and contact information of Sabina Heacon, instead of the information for the correct witness, Ms. Surby-Curtin. AR at 20, 197, 220; FF 20. The ALJ called Ms. Heacon, who informed her that she should call Ms. Surby-Curtin and provided her phone number. AR at 19–20, 197, 220; FF 20. The ALJ then called Ms. Surby-Curtin but received no answer. AR at 23, 197, 220; FF 20. The TALX representative requested a postponement of the hearing, but the ALJ denied the request. AR at 189, 197–98; FF 20. The representative declined to proceed in light of the unavailability of the employer’s key witness, and the ALJ issued a default order at 9:55 AM,

without trying to call Ms. Surby-Curtin a second time. AR at 185–86, 189, 198; FF 20.

The employer appealed the default order to the Commissioner, who issued an order remanding the case to the OAH to conduct a hearing on whether the employer had good cause for not participating in the hearing and on the merits of the case. AR at 193. The OAH held this hearing on January 27, 2011 and all relevant individuals appeared, including Ms. Surby-Curtin. AR at 11–12, 174.

Ms. Surby-Curtin explained that, on the morning on which the first hearing was scheduled, she stood by for over 30 minutes waiting for a phone call from the ALJ. AR at 23, 197; FF 20. Her colleague, Ms. Heacon, and the TALX representative had instructed her to make herself available at 9:15 AM that morning and that the ALJ would call her. AR at 24–25. After waiting for over 30 minutes without a call, she left her desk to help run the Krispy Kreme store because the store was understaffed due to inclement weather. AR at 23. At that point, she concluded that the ALJ likely had canceled the hearing and neglected to notify her. *Id.* When the ALJ eventually called, Ms. Surby-Curtin did not hear the phone ring. AR at 23, 197; FF 20.

Based on this evidence, the ALJ concluded that the employer had good cause for not participating in the first scheduled hearing. AR at 198;

Conclusion of Law (CL) 1. She proceeded to take testimony on the merits of the employer's appeal of the Department's initial grant of unemployment benefits. That testimony and the evidence admitted at that hearing served as the basis for the findings of fact detailed above.

The ALJ concluded that Mr. Moran committed misconduct disqualifying him from receiving benefits because he violated his employer's known reasonable rule concerning inventory reporting. AR at 198. Mr. Moran subsequently filed a petition for review with the Commissioner. AR at 202-06. The Commissioner adopted the ALJ's findings of fact and conclusions of law, including her multiple determinations that the testimony of Mr. Moran was less credible than that of the employer's representatives. AR at 209-11. The Commissioner also agreed that Mr. Moran had committed misconduct on the grounds that he violated a known reasonable employer rule. AR at 210. Mr. Moran then filed a petition for judicial review in King County Superior Court. That court affirmed the Commissioner's decision. This appeal followed.

#### **IV. STANDARD OF REVIEW**

The standard of review is of particular importance because Mr. Moran references alleged facts that were not incorporated into or supportive of the findings expressly made by the Commissioner, and therefore, are not subject to review. Washington's Administrative

Procedure Act governs judicial review of the Commissioner's decisions concerning eligibility for unemployment benefits. RCW 34.05.510; RCW 50.32.120. This Court sits in the same position as did the superior court on review of the agency action under the APA and applies the APA standards directly to the administrative record. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.2d 263 (2010).

This Court undertakes the limited task of reviewing the Commissioner's findings to determine, based solely on the evidence in the administrative record, whether those findings are supported by substantial evidence. RCW 34.05.558; *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). The Court then determines *de novo* whether the Commissioner correctly applied the law to those factual findings. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

This Court must consider the Commissioner's decision to be *prima facie* correct and the party asserting the invalidity of an agency action—here, Mr. Moran—bears the burden of demonstrating such invalidity. RCW 34.05.570(1)(a); *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006). The Court may grant relief only if “it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570.(1)(d).

**A. Review of Factual Matters**

The Court must limit its review of disputed issues of fact to the agency record. Unchallenged factual findings are verities on appeal. *Tapper*, 122 Wn.2d at 407. This Court must uphold an agency's findings of fact that are supported by substantial evidence. RCW 34.05.558; *Wm. Dickson Co.*, 81 Wn. App. at 411. Evidence is substantial if it is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987).

The reviewing court is to "view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed" at the administrative proceeding below. *Wm. Dickson Co.*, 81 Wn. App. at 411. A court may not substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403. The trier of fact resolves conflicting testimony, evaluates the credibility of witnesses, and weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992). A court sitting in its appellate capacity may not re-weigh evidence, witness credibility, or demeanor. *W. Ports*

*Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002); *Wm. Dickson Co.*, 81 Wn. App. at 411.

**B. Review of Questions of Law**

The Court is to review questions of law *de novo*, under the error of law standard. *Tapper*, 122 Wn.2d at 407. However, because the department has expertise in interpreting and applying unemployment benefits law, the Court should accord substantial weight to the agency's decision. *Markam Group, Inc. v. Emp't Sec. Dep't*, 148 Wn. App. 555, 561, 200 P.3d 748 (2009); *Wm. Dickson Co.*, 81 Wn. App. at 407.

**C. Review of Mixed Questions of Law and Fact**

Whether a claimant engaged in misconduct is a mixed question of law and fact. *Griffith v. Emp't Sec. Dep't*, 163 Wn. App. 1, 8, 259 P.3d 1111 (2011). To resolve a mixed question of law and fact, the Court must engage in a three-step analysis in which it: (1) determines whether the factual findings are supported by substantial evidence; (2) makes a *de novo* determination of the law; and (3) applies the law to the applicable facts. *See Tapper*, 122 Wn.2d at 403.

## V. ARGUMENT

### A. **The Commissioner Properly Exercised Discretion in Concluding that the Employer Had Good Cause for Not Participating in the First Administrative Hearing**

Under the APA, an ALJ may issue a default order if a party fails to participate in a hearing. RCW 34.05.440(2). If the party in default petitions for review of the default order, the Commissioner may set aside the order “upon a showing of good cause for failure to appear or to request a postponement prior to the scheduled time for hearing.” WAC 192-04-180. “The decision to set aside a default judgment is discretionary,” and an abuse of discretion occurs only if “a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *Graves v. Emp’t Sec. Dep’t*, 144 Wn. App. 302, 309, 182 P.3d 1004 (2008).

No appellate court has defined “good cause” in the context of setting aside a default order for failing to participate in an administrative hearing. In *Graves*, the court declined to establish a good cause standard because the reason for the claimant’s failure to appear—mismarking the hearing date on his calendar—is not good cause under any conceivable standard. *Graves*, 144 Wn. App. at 310. However, the court did suggest that the standard for good cause to set aside a default order under Civil Rule 55(c) may provide guidance for reversing a default order for not

participating in an administrative hearing. Under CR 55(c), a party establishes good cause by showing excusable neglect and due diligence. *Id.* at 310–11. Courts “do not favor default judgments” and will “liberally” set them aside, preferring “to give parties their day in court and have controversies determined on their merits.” *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007).

In a precedential published decision, the Commissioner established that a party has good cause for not participating in a hearing if the circumstances would have deterred a reasonably prudent person from participating. *In re Shay*, Emp’t Sec. Comm’r Dec.2d 970 (2011).<sup>3</sup> A reasonably prudent person is one “who uses good judgment or common sense in handling practical matters.” *Id.* The Commissioner stated that this reasonably prudent person standard is comparable to the excusable neglect and due diligence standards applied under Civil Rule 55(c). *Id.*

Here, the Commissioner properly exercised his discretion in concluding that the employer had good cause for not participating in the first scheduled administrative hearing. AR at 198, 209; CL 1. The employer, through its TALX representative, exercised due diligence in preparing to participate in the hearing by providing exhibits to its key

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<sup>3</sup> Under RCW 50.32.095, the Commissioner may designate certain Commissioner’s decisions as precedents. Such decisions are persuasive authority for the courts. *Martini v. Emp’t Sec. Dep’t*, 98 Wn. App. 791, 795, 990 P.2d 981, 984 (2000).

witness, Ms. Surby-Curtin, and confirming her attendance the day prior to the hearing. AR at 22, 24–25, 197; FF 19.

The employer's representative did cause some delay during the hearing by first providing the contact information of the incorrect witness. AR at 20, 197, 220; FF 20. But this mistake is excusable in light of the often confusing and cumbersome process of setting up conference calls in administrative hearings and coordinating attendees who often are not familiar with the proceedings. Indeed, this fact is illustrated in the transcript of the second administrative hearing here. After connecting several individuals one-by-one, everyone was disconnected when the ALJ tried placing another call. AR at 5–13. The ALJ then had to add all five attendees to the line again. *Id.*

The employer's key witness, Ms. Surby-Curtin, demonstrated due diligence and excusable neglect as well. She waited by her telephone for over 30 minutes for the ALJ's phone call. AR at 23, 197; FF 20. At that point, in light of the long delay, she made the common sense conclusion that the hearing had been canceled due to the inclement weather that day, which had left her store short-staffed. *Id.* Ms. Surby-Curtin behaved as would have a reasonably prudent person who is unfamiliar with administrative hearings. She exhibited due diligence and excusable neglect by waiting for a phone call for a reasonable amount of time and

returning to her job duties after concluding that the OAH had canceled the hearing without notifying her.

After the ALJ rejected her request for a postponement, the employer's representative informed the ALJ that she was unable to proceed. AR at 185–86, 189, 197–98; FF 20. Without its key witness, the employer could not put on its case in a meaningful way. As demonstrated by the second administrative hearing, Ms. Surby-Curtin's testimony was a vital facet of the employer's case.

Based on the foregoing, the Commissioner was not manifestly unreasonable in concluding that the employer had good cause for not participating in the hearing without its key witness. When analyzing the reasonableness of this discretionary decision, the Court should also consider the statutory requirement that the parties be afforded "reasonable opportunity for fair hearing." RCW 50.32.040. By concluding that the employer had good cause for not participating, the Commissioner ensured that both parties would have the chance to present their evidence and receive full consideration of the merits of the case.

The employer's representatives demonstrated due diligence in their preparation for the first administrative hearing and their good faith errors constituted excusable neglect. They conducted themselves as a reasonably prudent person would have under the circumstances. Accordingly, the

Commissioner properly exercised his discretion by determining that the employer had demonstrated good cause for not participating in the hearing. The end result was that each party received a full and fair hearing on the merits. This Court should affirm the Commissioner's conclusion.

**B. The Commissioner Correctly Concluded that Mr. Moran Committed Misconduct Based on Substantial Evidence that He Violated His Employer's Known Reasonable Inventory Rule**

The Employment Security Act, Title 50 RCW, was enacted to provide compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. The Act requires that the reason for the unemployment be external and apart from the claimant. *Cowles Publ'g Co. v. Emp't Sec. Dep't*, 15 Wn. App. 590, 593, 550 P.2d 712 (1976). As such, a claimant is disqualified from receiving unemployment benefits if he has been discharged from his job for work-connected misconduct.<sup>4</sup> RCW 50.20.066(1). The initial burden is on the employer to show by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. *Nelson v. Emp't Sec. Dep't*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982).

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<sup>4</sup> Mr. Moran does not dispute that his conduct at issue here was connected with his work. See WAC 192-150-200(2) ("[T]he action or behavior is connected with your work if it results in harm or creates the potential for harm to your employer's interests. This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to your employer's reputation or a negative impact on staff morale.")

Misconduct is defined by statute as:

- (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;
- (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;
- (c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or
- (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

RCW 50.04.294(1).

The statute also identifies numerous acts as *per se* misconduct. RCW 50.04.294(2); *Daniels v. Emp't Sec. Dep't*, 168 Wn. App. 1009, 281 P.3d 310, 313 (2012) (“Certain types of conduct are misconduct *per se*.”). These acts are deemed misconduct under subsection (a) above “because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” *Id.* One such act of *per se* misconduct is “[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule.” RCW 50.04.294(2)(f). The Commissioner correctly concluded that Mr. Moran committed misconduct under this provision.

“A company rule is reasonable if it is related to [the claimant’s] job duties, is a normal business requirement or practice for [the claimant’s] occupation or industry, or is required by law or regulation.” WAC 192-150-210(4). Mr. Moran does not dispute the reasonableness of his employer’s rule requiring the general manager to provide accurate counting and reporting of inventory. Implementing the inventory procedures was one of his express job duties and is a normal business practice for fast food restaurants. AR at 36–38, 102, 154–155, 195; FF 3, 8.

A claimant knew or should have known about an employer’s rule “if [he was] provided an employee orientation on company rules, [he was] provided a copy or summary of the rule in writing, or the rule is posted in an area that is normally frequented by [him] and [his] co-workers, and the rule is conveyed or posted in a language than can be understood by [him].” WAC 192-150-210(5).<sup>5</sup> Again, Mr. Moran does not argue that he did not know about his employer’s rule governing inventory procedures. He admits his knowledge in his brief and he signed a warning in 2008 indicating that he understood and agreed to implement his employer’s standard inventory procedures. AR at 155; Appellant’s Br., section V-B.

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<sup>5</sup> The employer rule need not be written or contained in a handbook for its violation to be deemed misconduct under RCW 50.04.294(2)(f). *Daniels*, 281 P.3d at 313.

The primary dispute is whether Mr. Moran violated his employer's rule. Mr. Moran argues that he did not commit misconduct because he did not intentionally violate the rule or engage in misconduct. Appellant's Br., section V-B. But the "reasonable employer rule" provision requires no such showing of intent. With respect to the claimant's subjective state of mind, the provision requires only that the claimant know about the existence of the reasonable employer rule. RCW 50.04.294(2)(f). If he then violates the known reasonable rule, such conduct "signif[ies] a willful or wanton disregard of the rights, title, and interests of the employer . . . ." *Id.* A violation of a known reasonable employer rule is willful or wanton *per se.* *Daniels*, 281 P.3d at 313.

Mr. Moran asks the Court to read a new intent requirement into the reasonable employer rule provision. But such statutory construction is unnecessary and improper. When the language of a statutory provision is clear and unambiguous, a court must derive its meaning from the wording of the provision alone. *Kinnan v. Jordan*, 131 Wn. App. 738, 751, 129 P.3d 807 (2006); *Clark v. Payne*, 61 Wn. App. 189, 192, 810 P.2d 931 (1991). The wording of RCW 50.04.294(2)(f) is clear: if a claimant violates a reasonable employer rule of which he is aware, he commits misconduct.

If the court determines that further interpretation of the reasonable employer rule provision is needed, case law addressing the issue before the enactment of the provision can provide guidance. In 2001, this Court stated that misconduct includes a violation of a reasonable employer rule if the violation was “intentional, grossly negligent, or took place after notice or warnings.” *Leibbrand v. Emp’t Sec. Dep’t*, 107 Wn. App. 411, 425, 27 P.3d 1186 (2001).

Mr. Moran committed misconduct under both the clear language of the *per se* provision and the standard discussed by this Court in *Liebbrand*. Mr. Moran’s employer maintained a policy that required him, as general manager, to accurately count and report the store’s inventory numbers every week. AR at 36–38, 102, 154–155, 195; FF 3, 8. Mr. Moran knew about this rule and received notice of and warnings about it. In 2008, he signed a final warning, acknowledging his understanding of these inventory procedures and promising to immediately implement them and prevent future inaccuracies, dishonesty, or manipulation of the inventory counts. AR at 155, 196; FF 9. He does not dispute this finding, thus it is a verity on appeal. *Tapper*, 122 Wn.2d at 407.

Mr. Moran delegated to a subordinate the task of hand-counting inventory. AR at 36, 45, 61, 102, 195; FF 6. He agrees with the Commissioner’s findings that inaccurate inventory totals were repeatedly

reported to his superiors after this delegation. AR at 55–59, 196, FF 12; Appellant’s Br., section V-B. But he argues that these persistent violations of the inventory rule cannot properly be attributed to him because he ordered someone else to carry out his duties. Appellant’s Br., section V-B.

Mr. Moran cannot disavow responsibility for these rule violations. As general manager, he alone bore the ultimate obligation to ensure that the inventory rules were not violated, whether he counted the inventory himself or caused a subordinate to conduct the count. AR at 38, 102–03, 155, 195; FF 3, 6. By signing the 2008 warning, he acknowledged that his employer’s rule required him, as general manager, to implement proper inventory procedures, which required accurate hand-counting and reporting of every item of stock present in the store. AR at 45, 57, 125–140, 155, 195; FF 4, 5, 6. But Mr. Moran violated this rule by repeatedly failing to discharge his duty to ensure that the numbers that he reported to his superiors were accurate.

Mr. Moran himself concedes that the evidence “showed that there were mistakes made by [him] in supervising Ms. Velasco and/or reviewing the inventory count that she provided to [him].” Appellant’s Br., section V-B. He knew that his co-manager had distributed mugs and shirts to store employees, yet he allowed these items to remain in the

weekly inventory counts. AR at 55–59, 83–84, 197; FF 15. He knew that the store’s fryer could hold only 14 cubes of shortening, but he repeatedly reported to his superiors that it contained 18 or more. AR at 101–05, 107, 197; FF 15. If Mr. Moran had conducted the counting himself, he could not absolve himself of responsibility for inaccurate numbers. Accordingly, he cannot deflect responsibility simply by delegating the counting to a subordinate and refusing to review the totals.

The employer’s rule required Mr. Moran to provide accurate inventory accounts. The rule was reasonable. He had knowledge and notice of and warnings about the rule. He violated the rule. The Commissioner correctly concluded that Mr. Moran committed misconduct. This Court should affirm the Commissioner’s decision.

**C. Mr. Moran’s Conduct Is Not Exempt from Misconduct under RCW 50.04.294(3)**

Mr. Moran argues that his conduct was exempt from disqualifying misconduct under RCW 50.04.293(3). Appellant’s Br., section V-B. He is incorrect. The Employment Security Act provides that misconduct does not include:

Nor does Mr. Moran's conduct constitute "[i]nadvertence or ordinary negligence in isolated instances" under subsection (3)(b). The rule violation for which Mr. Moran was fired was not an isolated instance. He had received a final warning for violating his employer's rule in an identical manner in 2008. AR at 37, 61–62, 155, 195–96; FF 8, 9. Also, the inventory numbers were reported inaccurately on numerous occasions, which Mr. Moran does not dispute. AR at 55–59, 196, FF 12; Appellant's Br., section V-B. The inaccurate inventory for which Mr. Moran was fired was the last in a long line of false reports.

Finally, Mr. Moran's conduct was not "[g]ood faith errors in judgment or discretion." RCW 50.04.294(3)(c). The act does not define this provision, nor has any precedent analyzed this exception. When a statute does not define a term, a court is to look to the ordinary dictionary meaning of the phrase. *Cheek v. Emp't Sec. Dep't*, 107 Wn. App. 79, 84, 25 P.3d 481 (2001). Webster's Third New International Dictionary defines "error" as "an act that through ignorance, deficiency, or accident departs from or fails to achieve what should be done . . . <an ~ of judgment>." *Webster's Third New International Dictionary* 772 (1993).

Mr. Moran did not commit a good faith error in judgment. In 2008, he intentionally overstated inventory counts and, as a result, received a final warning threatening termination if he did not properly

implement the employer's inventory procedures. AR at 37, 61-62, 155, 195-96; FF 8, 9. He then delegated the inventory counting duties to a subordinate and repeatedly allowed inflated inventory totals to be reported to his superiors. AR at 32, 37, 61-62, 152, 155-56, 195-96; FF 8, 9, 11. If Mr. Moran suffered from any ignorance here, it was willfully self-imposed. He did not make a mistake in reporting inaccurate inventory figures; he was fully aware of his responsibility to accurately report inventory but knowingly failed to carry it out.

## VI. CONCLUSION

The Commissioner correctly determined that Mr. Moran committed disqualifying misconduct by violating his employer's known reasonable rule requiring accurate inventory accounting. The Department respectfully requests that the Court affirm the Commissioner's decision that Mr. Moran is ineligible to receive unemployment benefits.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of September, 2012.

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